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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOSE GUADALUPE CONTRERAS, Defendant and Appellant.	E071800 (Super.Ct.No. RIF1503771) OPINION

APPEAL from the Superior Court of Riverside County. Thomas E. Kelly, Judge. (Retired judge of the Santa Cruz Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed with directions.

Barbara A. Smith, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Paige B. Hazard, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Jose Guadalupe Contreras was convicted of, inter alia, second degree murder, and he admitted one prison prior conviction, one serious felony prior, and one strike prior. He was sentenced to state prison for an aggregate term of 49 years four months. On appeal, he contends: (1) the trial court committed reversible error by denying his motion for mistrial or, in the alternative, a new jury panel, after the prosecutor engaged in prejudicial error during voir dire by using a "vodka in [a] water bottle" analogy to illustrate the concept of proof beyond a reasonable doubt; and (2) remand is required in light of Senate Bill No. 1393 (2017-2018 Reg. Sess.), which permits the trial court to strike his prior serious felony enhancement. (Pen. Code, §§ 667, subd. (a), 1385, subd. (b).) The People assert defendant's one-year prior prison term enhancement should be stricken pursuant to Senate Bill No. 136 (2019-2020 Reg. Sess. § 1; Stats. 2019, ch. 590), which limits imposition of the enhancement to sexually violent offenses. We will strike the one-year prison term enhancement and remand to allow the trial court to consider exercising its discretion under Senate Bill No. 1393. In all other respects, we affirm.

I. PROCEDURAL BACKGROUND AND FACTS

On July 25, 2015, after spending the afternoon and early evening drinking beer, defendant and Javier M. drove to a gas station in a black Suburban. At the gas station, defendant punched a 74-year-old transient, knocking him to the ground and then kicked him in the face, head, and back as he lay curled in a fetal position. At some point after leaving the gas station, defendant began driving the Suburban and crashed into a SUV and a pickup truck. A witness heard the crash, came outside, and saw a man attempting

to pull someone out of the Suburban from the passenger side and heard the man say, "Javi, are you okay?," before he ran down the alley.

Sheriff's deputies found Javier pinned in the Suburban, with no pulse. He died due to a broken neck or "internal decapitation." Deputies followed a trail of blood leading from the Suburban and eventually came in contact with defendant. Defendant was unconscious and bleeding. When he woke up, he became agitated upon seeing the deputies. He denied being in a car crash, claiming to have hit his head on a coffee table. Paramedics took him to the hospital.

At the hospital, a deputy observed defendant's speech was slurred, his breath smelled of alcohol, and he was emotional. When asked who was driving the Suburban, defendant "turn[ed] his body facing towards [the deputy, extended] his arms out straight, and his hands [were] closed in fist form" as if "he was submitting to [the deputy] to be arrested." Defendant said, "Let's go, G. Let's get this over with. Fuck it."

A jury found defendant guilty of second degree murder (Pen. Code, § 187, subd. (a), count 1), leaving the scene of a traffic collision without contacting law enforcement or rendering aid (Veh. Code, § 20001, subd. (a), count 2), and assault by force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(4), count 3). In a bifurcated proceeding, he admitted one prison prior conviction (Pen. Code, § 667.5, subd. (b)), one serious felony prior (Pen. Code, § 667, subd. (a)), and one strike prior (Pen. Code, §§ 667, subds. (c), (e)(1), 1170.12, subd. (c)(1)). Defendant also pleaded guilty to being a felon in possession of a firearm (Pen. Code, § 29800, subd. (a)(1), count 5), and admitted committing the offense while out on bail for the murder charge

(Pen. Code, § 12022.1). In a separate case (Riverside County Super. Ct. case No. SWF1807428), he pleaded guilty to possessing contraband in jail. The trial court sentenced him to state prison for an aggregate term of 35 years to life, plus 14 years four months.

II. DISCUSSION

A. Denial of Motion for a Mistrial/New Jury Panel.

Defendant argues the trial court erred in denying his motion for a mistrial or, in the alternative, a new jury panel, following the prosecutor's use of the "vodka in [a] water bottle" analogy to illustrate the concept of proof beyond a reasonable doubt. Defendant contends the prosecutor's analogy diluted the People's burden of proof. While we agree the use of a "vodka in [a] water bottle" analogy risks misrepresenting the standard of proof beyond a reasonable doubt, we find no prejudicial error in view of the prosecutor's remarks as a whole, the instructions provided to the jury, and defense counsel's closing argument.

1. Summary of voir dire proceedings.

During voir dire, the prosecutor discussed the concept of reasonable doubt by pointing to the clear liquid in defense counsel's water bottle, noting the possibility that it could be vodka, and asking the venire, "Does everybody agree that it would be unreasonable for one of us, as lawyers, professionals here, to be sitting in court drinking

vodka? Does everybody agree that that's kind of unreasonable?"[1] The trial court overruled defense counsel's objection to the "vodka" in the "water bottle" illustration. Outside the presence of the jury, counsel reserved a motion for mistrial for prosecutor error[2] but requested "that the Court just instruct on proof beyond a reasonable doubt."

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[1] "[PROSECUTOR]: Okay. Now, some people, because they hear this standard of proof beyond a reasonable doubt, they consider that—and rightly so—a high burden. On the other hand, the burden is such that there is no expectation and nowhere in the law does it require me to prove a case beyond any doubt. Okay? Everybody understand that I can't prove anything beyond any—to any absolute certainty? [¶] [Juror No. 2], you're okay with that? [¶] [Juror No. 2]: Yes.

"[PROSECUTOR]: You wouldn't hold me to a higher standard and say, 'Well, I still have some weird doubt or feeling about it'? You're okay with that? [¶] [Juror No. 2]: Yeah.

"[PROSECUTOR]: And then there's the idea of it has to be a reasonable doubt. I think this is [defense counsel's] water bottle. Excuse me. It's his bottle. It contains a clear liquid. I think you guys would all recognize that as a water bottle, right now, it's possible there's vodka in here.

"[DEFENSE COUNSEL]: I object to this line of —

"THE COURT: Well, it is possible.

"[PROSECUTOR]: Does everybody agree it's possible it's another clear liquid like gin or vodka; right?

"[DEFENSE COUNSEL]: This is minimizing the burden of proof.

"THE COURT: Overruled, Counsel.

"[PROSECUTOR]: Very quick illustration. [¶] . . . [¶] Does everybody agree that it would be unreasonable for one of us, as lawyers, professionals here, to be sitting in court drinking vodka? Does everybody agree that that's kind of unreasonable? Does anybody hear say, 'Well, you know, it might be vodka'? Okay. And that's frankly what the law expects of you. There's always alternative explanations, but you have to decide if they're reasonable or not; and if they're unreasonable, you can reject them. Is everyone okay with that?"

[2] "Because we consider the effect of the prosecutor's action on the defendant, a determination of bad faith or wrongful intent by the prosecutor is not required for a finding of prosecutorial misconduct." (*People v. Crew* (2003) 31 Cal.4th 822, 839.) Indeed, "'the term prosecutorial "misconduct" is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error.'" (*People v. Daveggio and Michaud* (2018) 4 Cal.5th 790, 853-854.)

When the jury returned to the courtroom, the court told the jury that it was going to read CALCRIM No. 220; but, since a copy of the instruction was not readily available, the court commented, "It's the reasonable doubt instruction, just so there's no confusion about what that law is. And the whole point of the discussion about the—*what's in the bottle is to show the difference between possible or slight doubt and reasonable doubt*, but I'll read you the actual instruction." (Italics added.) The court then read CALCRIM No. 220.

The next morning, defense counsel renewed his motion for mistrial or, alternatively, for a new venire based upon prosecutor error. Counsel argued that the way the "vodka in [a] water bottle" "metaphor was used had a tendency to confuse the issue of proof beyond a reasonable doubt. It was not used as, in other cases, where it has been suggested that it may be okay to use it to explain exclusively the concept of circumstantial evidence, but rather it was intertwined with the discussion of what proof beyond a reasonable doubt was. [¶] And based upon that, I think it falls afoul of *People v. Centeno*, 2014 case, 60 Cal.4th 659, and therefore would request that we begin again with an untainted jury with regard to the concept of proof beyond a reasonable doubt." The People opposed the motion, arguing no error or harm. The trial court proposed instructing the jurors with further curative language, but defense counsel resisted. After the jury was empaneled, the court instructed the jurors with the standard pretrial instructions, which included the reasonable doubt instruction.

2. Applicable legal principles.

"[W]e review a ruling on a motion for mistrial for an abuse of discretion, and such a motion should be granted only when a party's chances of receiving a fair trial have been irreparably damaged. In turn, '"[t]he applicable federal and state standards regarding prosecutorial misconduct are well established."'" (*People v. Ayala* (2000) 23 Cal.4th 225, 283.)

"'"[I]t is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements [citation]." [Citation.] Improper comments violate the federal Constitution when they constitute a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process. [Citation.] Improper comments falling short of this test nevertheless constitute misconduct under state law if they involve use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. [Citation.] To establish misconduct, defendant need not show that the prosecutor acted in bad faith. [Citation.]' However, '[w]hen attacking the prosecutor's remarks to the jury, the defendant must show that, "[i]n the context of the whole argument and the instructions" [citation], there was "a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner."'" (*People v. Bell* (2019) 7 Cal.5th 70, 111 (*Bell*).)

"In conducting this inquiry, we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements." (*People v. Frye* (1998) 18 Cal.4th 894, 970, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Equally, "[i]f the challenged comments, viewed in context, 'would have been taken by a juror to state or imply nothing harmful, [then] they obviously cannot be deemed objectionable.'" (*People v. Cortez* (2016) 63 Cal.4th 101, 130 (*Cortez*).)

"The case law is replete with innovative but ill-fated attempts to explain the reasonable doubt standard. [Citations.] [Our state Supreme Court] ha[s] recognized the 'difficulty and peril inherent in such a task,' and ha[s] discouraged such '"experiments"' by courts and prosecutors. [Citation.] [The Supreme Court] ha[s] stopped short, however, of categorically disapproving the use of reasonable doubt analogies or diagrams in argument. Rather, [it] assess[es] each claim of error on a case-by-case basis." (*People v. Centeno* (2014) 60 Cal.4th 659, 667 (*Centeno*) [reversal required since prosecutor's use of a visual display depicting the outline of the State of California, along with hypothetical testimony from hypothetical witnesses who described various cities and landmarks, misstated the burden of proof, misled the jury into believing its task was analogous to solving a picture puzzle unrelated to the evidence, and failed to accurately portray the state of the evidence presented at trial]; see *People v. Medina* (1995) 11 Cal.4th 694, 774-745 [prosecutor's use of a diagram during voir dire to illustrate the

standard of proof was not prejudicial misconduct because the seated jury was properly instructed on the standard of proof, and the prosecutor's voir dire remarks were made before evidence was received and formal instructions were given.]; *People v. Katzenberger* (2009) 178 Cal.App.4th 1260, 1264-1269 [prosecutor erred in using a slide show to display pieces of a puzzle depicting the Statue of Liberty to illustrate the reasonable doubt standard, but error was harmless]; *People v. Otero* (2012) 210 Cal.App.4th 865, 869-873 [prosecutor committed harmless error in using a diagram of the outlines of California and Nevada, with cities that were mislabeled or misidentified, to illustrate the reasonable doubt standard].)

3. Analysis.

As defendant asserts, the prosecutor's "vodka in [a] water bottle" analogy was somewhat problematic because: (1) "it invites jurors to use knowledge outside the trial record, to assess reasonable doubt"; and (2) "it invites the jurors to ignore what in fact could be a reasonable doubt" since "[t]here is substance abuse in the legal profession." "Prosecutors should avoid drawing comparisons that risk confusing or trivializing the reasonable doubt standard." (*Bell, supra,* 7 Cal.5th at p. 111.) Nevertheless, any error in the prosecutor's use of the "vodka in [a] water bottle" analogy here was not prejudicial because we conclude it is not reasonably likely the jury would have misunderstood the prosecutor's analogy as suggesting they could "speculate, guess, rely on outside

knowledge, and ignore the presumption of innocence."[3] (*Centeno, supra*, 60 Cal.4th at p. 667 [We "'"do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements.'"].) When evaluating the effect of the prosecutor's comments regarding the applicable standard of proof, "it is significant that the trial court properly defined the reasonable doubt instruction in both its oral jury instructions and the written instructions it gave the jury to consult during deliberations." (*Cortez*, *supra*, 63 Cal.4th at p. 131.)

Here, the prosecutor's use of the "vodka in [a] water bottle" analogy was limited to voir dire, before the presentation of evidence. (*People v. Woodruff* (2018) 5 Cal.5th 697, 756 [In general, "'it is unlikely that errors or misconduct occurring during voir dire questioning will unduly influence the jury's verdict in the case. Any such errors or misconduct "prior to the presentation of argument or evidence, obviously reach the jury panel at a much less critical phase of the proceedings."'"].) Upon defense counsel's objection, the trial court promptly charged the jury with CALCRIM No. 220, the reasonable doubt instruction. Acknowledging the court's reading of CALCRIM No. 220 "could alleviate the error," defendant nonetheless asserts "the court prefaced that re-reading with a remark which neutralized the beneficial effect of the re-reading." We

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[3] Defendant contends that three jurors heard the "vodka in [a] water bottle" analogy and juror No. 2 "agreed not to hold the prosecutor to a higher standard of proof than that applicable to deciding an attorney's clear liquid was not vodka." However, the record shows that juror No. 2 did not agree to apply the prosecutor's analogy. Rather, she agreed that the prosecutor is not required to "prove a case beyond *any* doubt." (Italics added.) The "vodka in [a] water bottle" analogy was made after the prosecutor distinguished "proof beyond a reasonable doubt" from proof "beyond any doubt."

disagree. The court explained that "the whole point of the discussion about the—*what's in the bottle is to show the difference between possible or slight doubt and reasonable doubt*, but I'll read you the actual instruction." (Italics added.) In other words, the jury was given an example of a possible, but unlikely, occurrence. "The statute defining the burden of proof expressly states that a 'reasonable' doubt is not a mere '"possible"' or '"imaginary"' doubt." (*Bell, supra,* 7 Cal.5th at pp. 111-112.) The court's comment did not undermine this standard.

Moreover, the trial court instructed the jury with CALCRIM No. 220 after the jury was empaneled and again prior to deliberations. And, the jury was instructed that defendant is presumed to be innocent, and the People have the burden of proving beyond a reasonable doubt that defendant committed the charged offenses. (*People v. Clair* (1992) 2 Cal.4th 629, 663, fn. 8 ["We presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade."].) "It is also significant that defense counsel emphasized the court's instructions on reasonable doubt numerous times during closing argument." (*Cortez, supra,* 63 Cal.4th at p. 132.) Early in his argument, he reminded the jury of both the presumption of innocence and the prosecution's burden of proving

defendant's guilt beyond a reasonable doubt.[4] Later, defense counsel reiterated the legal definition of reasonable doubt, stating, "That's what the abiding conviction is. It's not that preponderance of the evidence. It's not who's more likely. It's not a reasonable suspicion. It's that abiding conviction." At the end of his argument, he stated, "You simply have to focus like a laser on whether the district attorney proved every element beyond a reasonable doubt, whether they have proved it to an abiding conviction."

Nonetheless, defendant contends "[i]t is structural error and reversible per se to dilute the burden of proof." A similar argument was made and rejected in *People v. Katzenberger*, *supra*, 178 Cal.App.4th at p. 1268: "Unlike the cases of *Sullivan v.*

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[4] "The place I like to start is the reasonable doubt instruction, 220. . . . It starts off going back to those fundamental constitutional principles that we were talking about at the very beginning of the case; that [defendant] is presumed innocent, and that unless the People prove beyond a reasonable doubt that he is guilty, your obligation is to acquit. [¶] So there's no burden whatsoever on myself or [defendant]. If the People's case does not stand that beyond a reasonable doubt, you believe he was driving and he consciously disregarded human life, then your obligation is to acquit. [¶] The instruction defines proof beyond a reasonable doubt as an abiding conviction that the charge is true. It's the closest thing that you'll get to a definition. So we break that down, that concept of an abiding conviction. Abiding is something that's persistent, something that's long lasting. It's not an everyday decision. [¶] When we talk about everyday decisions, whether we decide to drive to work, whether we decide to cross a street at a given time. The normal decision calculus that we're engaged in is, 'Does this make sense to me or not?' 'Is it more likely beneficial for me to do this?' [¶] But abiding is getting to that fundamental premise that you're not just making an everyday decision. You're making a decision that is going to be persistent, that is going to be forever. [¶] And a conviction. If any of you were required to list what your convictions were, it would be a short list: Honesty, integrity, care for your family. What that's telling you is that you're not just deciding; that this is a conviction that you have, that you carry with you as you go forward. And it's not an everyday decision. And the confidence you have to have in your decision has to be that abiding conviction. [¶] The instruction includes that it's not proof beyond all imaginary doubt or possible doubt because anything in life is open to possible or imaginary doubt."

Louisiana (1993) 508 U.S. 275, 278-282 . . . and *People v. Johnson* [(2004)] 119 Cal.App.4th 976 . . . , cited by defendant,[5] we are not dealing here with instructions given by the trial court or comments made by the trial court under the cloak of its authority. Instead, we are dealing with misconduct by a prosecutor. Prosecutorial misconduct is reviewed for prejudice." We agree. Thus, we consider whether there is a "reasonable probability that a result more favorable to [defendant] would have occurred absent the error." (*People v. Dalton* (2019) 7 Cal.5th 166, 259 [reasonable probability test applies to errors of state law], citing *People v. Watson* (1956) 46 Cal.2d 818, 837; see *People v. Rhoades* (2019) 8 Cal.5th 393, 418 ["Prosecutorial misbehavior 'violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." [Citation.] But conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves "'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"""].)

The contextual factors here are persuasive as to the lack of prejudice from the use of the "vodka in [a] water bottle" analogy. The prosecutor's use of the analogy was isolated to jury voir dire, and it was not so extensive and egregious as to render the trial fundamentally unfair, infringing on defendant's federal due process rights. Moreover, the

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5 Here, defendant cites only to *Sullivan v. Louisiana*, *supra*, 508 U.S. 275 in support of his claim that "[i]t is structural error and reversible per se to dilute the burden of proof."

jury was correctly instructed on reasonable doubt, and defense counsel emphasized the instruction on reasonable doubt. (*People v. Dalton*, *supra*, 7 Cal.5th at p. 260 [prosecutor's statements were not the "'last explanation of reasonable doubt the jury heard'"].) Thus, we conclude it is not reasonably probable defendant would have obtained a more favorable result had the prosecutorial error not occurred. (*Id*. at p. 259.) Consequently, the trial court did not abuse its discretion in denying defendant's motion for a mistrial or, in the alternative, a new jury panel.

B. Senate Bill No. 1393.

Defendant contends remand is required to allow the trial court to exercise its newly authorized discretion under Senate Bill No. 1393 to strike his prior serious felony enhancement. (§§ 667, subd. (a), 1385, subd. (b).) We agree.

Senate Bill No. 1393, enacted on September 30, 2018, and effective January 1, 2019, amended both Penal Code sections 667, subdivision (a), and 1385, subdivision (b) (Stats. 2018, ch. 1013, §§ 1, 2), to delete restrictions on the trial court's sentencing discretion to strike prior serious felony convictions for sentencing purposes. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971.) Thus, the trial court is no longer prohibited from striking prior serious felony convictions during sentencing. Defendant contends, and the People agree, Senate Bill No. 1393 applies retroactively to this case, since the judgment is not final. (See *In re Estrada* (1965) 63 Cal.2d 740, 743-744; *Garcia*, at pp. 971-973.) However, the People argue remand is unwarranted because "the trial court clearly indicated that it would not have dismissed the serious felony enhancement even if it had discretion to do so." The People point to the trial court's denial of defendant's

People v. Superior Court (*Romero*) (1996) 13 Cal.4th 497 motion to strike his strike prior, along with its comments that defendant "'earned' his sentence due to the 'brutal,' 'horrific' and 'outrageous' nature of these crimes."

Senate Bill No. 1393 is similar to Senate Bill No. 620 (2017-2018 Reg. Sess.), which amended Penal Code section 12022.53, subdivision (h) (Stats. 2017, ch. 682, § 2), to provide that "'[t]he court may, in the interest of justice pursuant to [s]ection 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section.'" (See *People v. McDaniels* (2018) 22 Cal.App.5th 420, 424 (*McDaniels*).) In *McDaniels*, the court held that a remand for resentencing under Senate Bill No. 620 was required "unless the record show[ed] that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement." (*Id*. at p. 425.) In other words, "if '"the record shows that the trial court would not have exercised its discretion even if it believed it could do so, then remand would be an idle act and is not required."'" (*Ibid*.) Here, the record does not show the trial court would not have exercised its discretion, even if it believed it could do so.

We recognize the trial court's sentencing choice and statement suggest it might not have exercised its discretion to strike defendant's prior serious felony enhancement. But this does not foreclose the possibility the trial court would have stricken the enhancement if it had the discretion to do so. (*McDaniels*, *supra*, 22 Cal.App.5th at p. 425 [The record fails to show the trial court "clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a [serious felony] enhancement."]; *People v.*

Gutierrez (1996) 48 Cal.App.4th 1894, 1896.) Accordingly, remand is appropriate to allow the trial court to consider exercising its discretion to strike defendant's prior serious felony enhancement under Senate Bill No. 1393.

C. Senate Bill No. 136.

Finally, the parties agree defendant's one-year prior prison term enhancement must be stricken in light of Senate Bill No. 136. "Senate Bill No. 136 amended section 667.5, subdivision (b) regarding prior prison term enhancements. Former section 667.5, subdivision (b) imposed an additional one-year term for each prior separate prison term or county jail felony term, except under specified circumstances. However, amended Penal Code section 667.5, subdivision (b) imposes that additional one-year term only for each prior separate prison term served for a conviction of a sexually violent offense as defined in Welfare and Institutions Code section 6600, subdivision (b). [Citation.] 'By eliminating section 667.5, subdivision (b) enhancements for all prior prison terms except those for sexually violent offenses, the Legislature clearly expressed its intent in Senate Bill No. 136 . . . to reduce or mitigate the punishment for prior prison terms for offenses other than sexually violent offenses.'" (*People v. Smith* (2020) 46 Cal.App.5th 375, 396.) Accordingly, the now-inapplicable one-year prior prison term enhancement under Penal Code section 667.5, subdivision (b), currently attached to defendant's sentence is stricken. (Pen. Code, § 1260 [granting appellate court power to reduce punishment imposed].)

III. DISPOSITION

We strike the one-year prior prison term enhancement imposed under Penal Code section 667.5, subdivision (b), pursuant to Senate Bill 136, and remand the matter for the trial court to consider exercising its discretion under Penal Code sections 667, subdivision (a), and 1385, subdivision (b), as amended by Senate Bill No. 1393. Following remand, the trial court is directed to prepare a new abstract of judgment and forward a copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

McKINSTER
J.

We concur:

RAMIREZ
P. J.

MENETREZ
J.